In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1952

No. 466

JOHN A. MALONE and ELEANOR F. DANA,
Petitioners,

vs.

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA and THE HONORABLE GEORGE B. HARRIS, AS JUDGE THEREOF,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for
the Ninth Circuit
AND
BRIEF IN SUPPORT THEREOF.

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THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA and THE HONORABLE GEORGE B. HARRIS, AS JUDGE THEREOF,
Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of John A. Malone and Eleanor F. Dana for a writ of certiorari to the United States

Court of Appeals for the Ninth Circuit, respectfully shows:

STATEMENT OF THE CASE PRESENTING THE QUESTIONS INVOLVED.

This was an original application made to the United States Court of Appeals for the Ninth Circuit, seeking permission to file in that Court a petition for writ of prohibition to prohibit and enjoin respondents above named from taking any further action in a criminal cause wherein petitioners were defendants on the ground that said District Court had lost all jurisdiciition in the matter due to an order made by that Court dismissing the indictment.

The documents presented to the Court of Appeals were as follows:

1. Motion for leave to file petition (R. p. 1);[1]
2. Points and authorities (R. p. 2);
3. Petition for writ of prohibition (R. p. 10).

The Court of Appeals denied, without opinion, the motion for leave to file the petition for writ of prohibition on October 31, 1952. (R. p. 20.)

The petition for writ of prohibition (R. p. 10) recited the following facts:

On February 13, 1952 the Federal Grand Jury for the Northern District of California returned to the District Court for said District, an indictment num-

[1]Page references herein are to the page numbers of the typewritten record on appeal, the same not as yet having been printed by the Clerk of the Supreme Court.

bered 33157, wherein your petitioners herein, together with a corporation named as Shumates, Inc., were charged with a violation of Section 371 of Title 18 of the United States Code by unlawfully conspiring to defraud the United States and to commit offenses against the United States. (R. 11.)

On March 13, 1952 your petitioners herein, John A. Malone and Eleanor F. Dana, filed in said District Court their respective motions to dismiss said indictment; that on said last mentioned date certain persons moved the District Court for an order setting aside and quashing the alleged service of summons issued therein on February 14, 1952 and directed to said alleged corporation (R. 11); that said motions to dismiss said indictment and to quash said service of summons came on regularly for hearing before said District Court, the Honorable Louis E. Goodman, Judge Presiding, and after argument were submitted to the Court for its judgment and decisions on said motions; that thereafter and on April 17, 1952, said United States District Court by said Honorable Louis E. Goodman as Judge thereof, *made its order dismissing said indictment as to all defendants* (R. 12).

On April 18, 1952 the United States of America filed in said District Court and cause, a document entitled "Motion for Rehearing" reading as follows:

> "Comes now the United States and moves this Honorable Court to vacate and set aside the order of this Court entered herein on the 17th day of

April, 1952, sustaining the motion of defendants to dismiss, and to grant a rehearing thereon." (R. 12.)

That written notice was served on the attorneys of record appearing for defendants that said motion of the United States would come on for hearing before said District Court and said Judge Louis E. Goodman, on the 25th day of April, 1952; that on said last mentioned date the defendant John A. Malone, by his attorney of record and said defendant Eleanor F. Dana, by her attorney of record, specially appeared in said District Court and objected to the Court hearing said alleged motion for a rehearing or to the Court taking any further action or proceeding in said cause on the ground that said District Court had divested itself of jurisdiction over all matters pertaining to said cause and of all jurisdiction over each of said defendants, for the reason that the Court having dismissed said indictment as to all defendants on April 17, 1952, there was nothing pending before said District Court and that the Court was without jurisdiction to proceed further or to make any additional orders in the case. (R. 12-13.)

On May 16, 1952, despite the opposition and objections of said defendants, who are the petitioners herein, said United States District Court and the Honorable Louis E. Goodman, as Judge thereof, made and entered the following order in writing in said action No. 33157 (R. 14):

"Order Vacating Order Granting Motion to Dismiss, Denying Motion to Dismiss and Granting Motion to Quash as to Defendant Shumates, Inc.

On April 17, 1952, the court, after hearing, sustained defendants' motions to dismiss the indictment herein. Pursuant to the petition of the United States, the Court has reheard the motions. I am now satisfied that the previous order is erroneous and that the court has power to correct it. Ex parte Altman, 34 Fed.Supp. 106 (S.D. Calif. 1940). The indictment adequately charges conspiracy. 18 USC 371. The previous order therefore is vacated and the motions to dismiss are severally denied.

While paragraph 5(b) of the indictment does not adequately charge a *substantive* offense, it is capable of clarification by corrective indictment, if proceedings therefor are had, or if not, the rights of the defendants can be adequately protected by the court at the trial, or after verdict by appropriate motion.

The motion to quash service of summons upon Shumates, Inc., is still before the court and it is granted.

Dated: May 16, 1952.

Louis E. Goodman,
United States District Judge."

That no further action was taken in said cause until the 9th day of October, 1952, whereupon the Clerk of said District Court served a written notice on the respective counsel for said defendants Malone

and Dana and on the Assistant United States Attorney, that on Monday, the 13th day of October, 1952, the matter of indictment No. 33157 would come on before the Judge of the master calendar of said District Court for the taking and entry of the pleas of the said two defendants; that on the 13th day of October, 1952 said matter was continued until the 14th day of October, 1952. (R. 14.)

On October 14, 1952 the defendant John A. Malone by his attorney, James E. Burns, and the defendant Eleanor F. Dana by her attorney, Leo R. Friedman, appeared specially before said United States District Court and the Judge of the master calendar thereof (being the Honorable George B. Harris, one of the respondents above named) and objected to any further action or proceedings being taken in said matter; objected to the insistence of the Court and the United States Attorney that the pleas of said defendants be taken and entered, all on the ground that there was no cause or matter pending before said District Court as, the indictment having been dismissed, the Court was without jurisdiction to proceed further in the matter, and that the order made by said Court and Judge Louis E. Goodman on the 16th day of May, 1952 vacating the order of April 17, 1952 dismissing said indictment as to all defendants was void on its face and could not and did not reinvest the Court with jurisdiction over said indictment or the subject matter thereof or of either of said defendants Malone and Dana; that at said time and place

Judge George B. Harris speaking for and on behalf of said respondent court, emphatically stated that he would be bound by the order made by Judge Louis E. Goodman on May 16, 1952 that the Court and the Judge thereof had jurisdiction to make said last mentioned order, that said last mentioned order had revived the jurisdiction of said District Court over said indictment, the alleged offense set forth therein and over the persons of said defendants. Judge Harris further stated that he, as the Judge of said Court and said Court were fully clothed with jurisdiction to proceed with all future steps in said matter and upon said indictment, that he and said Court would insist upon the entry of pleas of said defendants and if pleas of not guilty were entered would proceed to the trial of said action, or if different pleas were entered would proceed to act in the customary manner upon the entry of said pleas; that an order was then made continuing the entry of pleas by said defendants to the 30th day of October, 1952, all over the objections of said defendants and petitioners herein. (R. 15-16.)

The petition further recited that the respondents had no jurisdiction in said matter of said action due to the fact that the Court by dismissing said indictment as to all defendants on April 17, 1952, thereby lost and divested itself of all further jurisdiction over said action and said defendants and was thereafter without power or jurisdiction to reinstate said indictment and that the order made on

May 16, 1952 vacating the order dismissing said indictment made on April 17, 1952 was and is void and so appears on its face. The petition further alleged that unless restrained and prohibited by order of the Court of Appeals, respondents and each of them intend to proceed to exercise a purported jurisdiction in said criminal cause and have threatened so to do as above set forth in the petition, all to the great prejudice and damage of each petitioner herein; that your petitioners and each of them, have no plain, speedy and adequate remedy in the ordinary course of law; that no appeal lies from the order of the Court made on May 16, 1952 vacating and setting aside the order made on April 17, 1952 dismissing said indictment as to all defendants; that each of your petitioners must appear in said District Court and enter their pleas therein; that they will be forced to enter their pleas of not guilty to said indictment and the charge contained therein; that they will have to employ and compensate counsel for their defense at the trial thereof and will have to stand trial thereof with all its attendant expense, delay, harassment and vicissitudes; that being compelled to submit to said trial and to appear before said District Court as aforesaid will constitute a violation of each of said petitioner's constitutional rights as each of said threatened steps and proceedings in said matter will be without due process of law and in violation of the due process clause of the Constitution of the United States. (R. 16, 17.)

On October 28, 1952 petitioners filed in the Court of Appeals for the Ninth Circuit, their motion for leave to file said petition for writ of prohibition as aforesaid and on October 31, 1952, the United States Court of Appeals for the Ninth Circuit made its order reading in full as follows (R. 20):

> "Upon consideration of the Motion for Leave to file Petition for Writ of Prohibition, said Motion is denied.
>
> Dated: October 31, 1952.
>
> William Denman,
> Chief Judge,
> William Healy,
> Walter L. Pope,
> United States Circuit Judges."

JURISDICTIONAL STATEMENT.

1. Jurisdiction of the Court.

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1).

2. The Order and Decree of the Court of Appeals.

The order and decree of the Court of Appeals denying the motion for leave to file petition for writ of prohibition was made and entered on October 31, 1952. (R. p. 20.)

3. Basis upon which it is contended the Supreme Court has jurisdiction, and cases in support thereof.

Where an original proceeding for an extraordinary writ, such as prohibition, is filed in the Court of Appeals to control the action of the District Court within its circuit and said writ is denied or leave to file the same denied by the Court of Appeals, this Court has jurisdiction to review the action of the Court of Appeals on a writ of certiorari. (*McClellan v. Carland,* 217 U.S. 268, 275-277.)

QUESTIONS PRESENTED.

(1) Where the record discloses that a District Court has knowingly and intentionally dismissed an indictment as to all defendants, is not said District Court thereafter without jurisdiction to take any further steps in said criminal case?

(2) Can a District Court knowingly and intentionally dismiss an indictment as to all defendants

and thereafter reinvest itself with
setting aside said order dismissing sa

(3) Where an application for leav
of prohibition is made to a Court
enjoin a District Court from proceed
a criminal action and said applicatio
face that said District Court is witho
diction and that there is no appeal fr
of the District Court, are not petiti
as a matter of right, to the issuance of

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HE ISSUANCE OF
RARI.

**POINTS RELIED UPON FOR THE ISSU
WRIT OF CERTIORARI.**

d for herein should

The writ of certiorari prayed for
issue for the following reasons:

1. The record in the Court of App
its face that the District Court had lo
tion to proceed further in the case.
the Court of Appeals, in denying th
leave to file the petition for writ of ce
tions a procedure whereby a trial Cour
all jurisdiction over a matter may s
invest itself of jurisdiction and subject
and the Government to the expense, tr
vicissitudes of a criminal trial. The ma
is one of grave importance that meri
consideration and decision of this,
Court of the United States.

of Appeals shows on
had lost all jurisdic-
case. The action of
ying the motion for
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al Court who has lost
may *sua sponte* re-
subject both a citizen
ense, tribulations and
The matter presented
t merits the earnest
this, the Supreme

2. The action of the Court of A
record before it, is a clear holding t

of Appeals, on the
lding that the inten-

tional dismissal of an indictment by a District Court, not accompanied by any mistake of fact, does not divest such Court of the power to proceed to thereafter try the defendant upon such indictment. This never has been and cannot be the law and the point should be definitely settled by this, the Supreme Court.

WHEREFORE, petitioners respectfully submit that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, to the end that the questions involved may be fully presented and argued and justice done in the premises.

Dated, San Francisco, California,
November 24, 1952.

Respectfully submitted,
LEO R. FRIEDMAN,
JAMES E. BURNS,
Attorneys for Petitioners.

CERTIFICATE OF COUNSEL

I hereby certify that I am a member of the bar of the Supreme Court of the United States and that I am one of the counsel for the petitioners in the above entitled cause and that in my judgment the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,
November 24, 1952.

LEO R. FRIEDMAN,
Attorney for Petitioners.

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THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA and THE HONORABLE GEORGE B. HARRIS, AS JUDGE THEREOF,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE ORDER AND JUDGMENT OF THE COURT BELOW.

The order of the Court of Appeals denying leave to file petition for writ of prohibition was made and entered on October 31, 1952. (R. 20.)

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1).

The Supreme Court has jurisdiction to review by certiorari the action of a Court of Appeals in denying a petition for writ of prohibition where the writ sought to control the action of the District Court within its circuit and in a case where the District Court was proceeding to act in a criminal case after it had lost all jurisdiction therein. (*McClellan v. Carland,* 217 U.S. 268, 275-277.)

STATEMENT OF THE CASE.

A full statement of the case is set forth in the foregoing petition.

Summarized, the case is as follows:

An indictment having been filed in the United States District Court for the Northern District of California naming petitioners herein as defendants, said defendants appeared in said District Court and filed written motions to set aside said indictment. After argument the Court granted said motions and *dismissed the indictment as to all defendants.* Thereafter the United States moved the Court to set aside said order dismissing said indictment, which motion the Court granted over the objection of defendants that the Court was without jurisdiction to proceed further in the case. Thereafter the District Court insisted that the defendants enter their pleas to said

indictment and threatened to proceed with the trial of said action after the entry of said pleas, all over the objections of said defendants that the Court was without jurisdiction. Application was then made to the Court of Appeals for the Ninth Circuit for a writ of prohibition to enjoin and restrain the District Court from proceeding further in said criminal case. The Court of Appeals denied petitioners leave to file said petition.

SPECIFICATION OF ERRORS RELIED UPON.

1. The Court of Appeals erred in denying petitioners' motion for leave to file said petition for a writ of prohibition.

2. The Court of Appeals erred in inferentially holding, by its denial of leave to file said petition, that it had discretion in the matter and that, under the facts stated in the petition, the writ should not issue as a matter of right.

3. The Court of Appeals erred in inferentially holding, by its order denying leave to file said petition, that where a District Court has intentionally dismissed an indictment, not due to any mistake of fact, that such Court could reinvest itself with jurisdiction by setting aside the order dismissing said indictment.

ARGUMENT.

I. SUMMARY OF ARGUMENT.

Upon the authorities hereinafter cited, petitioners argue and contend as follows:

Where a District Court knowingly and intentionally makes an order dismissing an indictment, such Court is thereafter divested of all jurisdiction to proceed further in the case; that when such District Court attempts to exercise further jurisdiction in such a case, the defendant in such action is entitled to have a writ of prohibition issued out of a Court of Appeals as a matter of right. The refusal of the Court of Appeals to allow a petition for writ of prohibition to be filed reciting the foregoing circumstances, is error that can be reviewed by the Supreme Court on certiorari and is in effect a denial of the issuance of the writ of prohibition.

II. WHEN THE ISSUANCE OF A WRIT OF PROHIBITION IS A MATTER OF RIGHT AND NOT OF DISCRETION.

The rule as to when a writ of prohibition will issue as a matter of right has been ofttimes stated by this Court.

> "The settled rules in reference to the writ of prohibition were thus laid down in *Re Rice,* 155 U.S. 396, 402 (39: 198, 201): 'Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy

is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary."

Ex parte Alix, 166 U.S. 136, 137, 41 L. ed. 948, 949;

Smith v. Whitney, 116 U.S. 167, 173, 29 L. ed. 602, 603;

In Re Rice, 155 U.S. 396, 402, 39 L. ed. 198, 201.

The petition herein discloses that the Court knowingly and intentionally dismissed the indictment and that its action was not induced by any fraud or mistake of fact. The Court thus became divested of all jurisdiction to proceed further in the matter. The motion of the Government for reconsideration of such order of dismissal was a new proceeding at the outset of which petitioners herein objected to the jurisdiction of the Court. Under such circumstances they were entitled to have their petition filed in the Court of Appeals and to have either an order to show cause or alternative writ issued thereon.

III. THE COURT OF APPEALS HAD JURISDICTION TO ISSUE THE WRIT.

Title 28 U.S.C., Sec. 1651 confers upon all Courts established by Acts of Congress the power to issue all writs necessary or appropriate in aid of their respective jurisdictions. It further provides that an alternative writ or rule *nisi* may be issued by a justice or judge of a Court having such jurisdiction.

The indictment having been properly filed in the District Court for the Northern District of California, appellate jurisdiction over such cause is vested in the Court of Appeals for the Ninth Circuit. (28 U.S.C. Secs. 1291 and 1294.)

Although no appeal has actually been prosecuted from the order of the District Court setting aside its order dismissing the indictment *as no appeal lies from such order,* the matter is still within the appellate jurisdiction of the Court of Appeals and that Court can control the action of the lower Court by any appropriate writ. (*McClellan v. Carland,* 217 U.S. 268, 279, 54 L. Ed. 762, 766.) Under the authority of the last cited case the Supreme Court has jurisdiction to review the action of the Court of Appeals in such matter.

IV. THE DISMISSAL OF THE INDICTMENT BY THE DISTRICT COURT DIVESTED THAT COURT OF ALL JURISDICTION TO PROCEED FURTHER IN THE MATTER.

The effect of granting a motion to dismiss an indictment is to wipe out the indictment and leave the case standing as though no indictment had ever been

filed. The rule is correctly stated in *People v. Grace,* 88 Cal. App. 222, 229, 263 Pac. 306, as follows:

> "The dismissal of the information terminated that proceeding, and so far as the indictment was concerned, effectively disposed of the information as though it had never been filed. When the defendant stood before the court and was arraigned under the indictment, his status was the same as though there never had been an information filed against him, or that he had never been tried under the information, found guilty and the case reversed."

And the same rule will be found set forth in the following cases:

State v. McKinley (Mo.), 111 S.W. (2d) 115, 118;
Pray v. State (Ariz.), 106 Pac. (2d) 500, 502;
State v. Andres (Fla.), 5 So. (2d) 7, 9;
State v. Veterans of Foreign Wars (Ia.), 274 N.W. 916, 112 A.L.R. 383.

In *Ex parte Bain,* 121 U.S. 1, 30 L. Ed. 849, defendant had been convicted after the Court had amended the indictment by striking out certain portions thereof. The Supreme Court released the defendant on a writ of habeas corpus and in doing so said:

> "It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the of-

fense is gone, and the court has no right to proceed any further in the progress of the case *for want of an indictment.* If there is nothing before the court which the prisoner, in the language of the Constitution, can be 'held to answer', he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. *The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a nolle prosequi had been entered.* There was nothing before the court on which it could hear evidence or pronounce sentence. The case comes within the principles laid down by this court in *Ex parte Lange,* 85 U.S. 18 Wall. 163 (21:872); *Ex parte Parks,* 93 U.S. 18 (23:787); *Ex parte Wilson* (*supra*), and other cases.'"[2]

Thus, in the *Bain* case this Court has held that the dismissal of an indictment has the same effect as the entry of a *nolle prosequi* and that *in each instance the jurisdiction of the Court is terminated.*

The entry of a *nolle prosequi* terminates that particular proceeding.

> "It is not a bar to a second indictment covering the same matter, although it does terminate the proceedings in which the nolle prosequi occurs."
>
> *United States v. Fox* (3 Cir.), 130 Fed. (2d) 56, 58;
>
> *Zole v. Allen,* 93 Fed. Supp. 95, 97.

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[2]All emphasis appearing in quotations in this brief has been supplied by the writers.

In 22 *C.J.S.*, Sec. 456, page 705, the effect of an entry of *nolle prosequi* is stated as follows:

> "While the entry of nolle prosequi is not a final disposition of the case, and will not bar another prosecution for the same offense, unless it is entered after accused has been put to his trial on a valid indictment before a jury duly sworn and impaneled, see supra §§ 253-255, nevertheless, it is a discharge, and necessarily *is a termination of the particular prosecution. On entry it is a dismissal or nullification of the particular indictment, and renders nugatory any proceedings carried on subsequently under the same indictment. No conviction of accused may be had except by beginning a new case against him. After the entry of a nolle prosequi accused stands uncharged with any crime.*"

In the instant case the District Court having dismissed the indictment after fully considering the matter, the matter stood as if no indictment had ever been filed and there was nothing before the Court on which it could further proceed.

Rule 12(b)(5), Rules of Criminal Procedure, reads in part as follows:

> "If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment or information."

The foregoing rule is a clear indication that the granting of a motion to dismiss an indictment ter-

minates for all times that particular proceeding, leaving the Government in the position of having to seek a new indictment, or appealing within 30 days from such order. (18 U.S.C. 3731.)

In the instant case the Court made no order directing that petitioners be either held in custody or their bail continued pending the filing of a new indictment.

V. THE CASE OF EX PARTE ALTMAN, 34 FED. SUPP. 106.

The District Judge in his order vacating the order dismissing the indictments held that the Court had power so to do on the authority of the above case. Such case is no authority for the action of respondents.

The *Altman case* involved the removal of Altman from California to Michigan. The facts were that on December 18, 1936 the indictment was returned in the Michigan Court. On January 26, 1937, a little over a month later, the case was set for trial. On the next day, January 27th, the Court made its order dismissing the case for lack of prosecution. On February 17, 1937 the Government moved to set aside the order of January 27th and on April 13, 1939 the Michigan Court set aside said order. It is apparent that the order dismissing the cause was inadvertently made on a mistake of fact. The matter did not, as here, involve the attempt of the trial judge to correct an error of law. However, the District judge in the *Altman case* held as follows: (1) That in the

proceeding before him he had to presum to presume that the
orders made by the Michigan judge were dge were valid; (2)
That Altman was not entitled to any hea any hearing on the
matter before trial. All other language anguage in the Alt-
man decision is mere dicta and in direct va direct variance with
the cases we have heretofore cited in cited in this brief.

The *Altman case* has only been cited on en cited once, in the
case of *United States v. Koen,* 87 Fed. 87 Fed. Supp. 589,
where the District Court in the latter cas latter case construes
the *Altman case* as holding that a Coua at a Court may set
aside an order which was entered due to cd due to clerical mis-
take, that is, where the order as entered w entered was not the
order pronounced or intended by the Co by the Court. With
this rule we have no quarrel.

The District judge in the *Altman case* w *nan case* was in error
in holding that the order of dismissal was nissal was not a final
order. His very reasoning is unsound a unsound as he holds
that no such order is final unless it oper ess it operates as an
acquittal or as a bar to a second prosecu nd prosecution. Such
is not the law. A final order is one which one which terminates
a particular proceeding.

If the dicta in the *Altman case* be sound *se* be sound, then if a
Court granted a judgment of acquittal, acquittal, the judge
could set it aside on motion of the Gove f the Government on
the ground that upon further considerati consideration he felt
the evidence was sufficient to justify a justify a finding of
guilt. Of course, such cannot be the law. e the law.

Once a Court has divested itself of juri self of jurisdiction in
a criminal case, there being no longer a v longer a valid indict-
ment pending before it, the Court has not urt has nothing before
it on which it can act.

The opinion in the *Altman case* clearly shows that the District Judge decided the case on the ground that the order dismissing the cause was made through inadvertence and did not correctly set forth the order which the Court had actually made. (See p. 109.)

In the District Court the Government cited the cases of *United States v. Benz,* 282 U.S. 304; *United States v. Mayer,* 235 U.S. 55 and *Flowers v. United States,* 86 Fed. (2d) 79, in support of its contention that a Court has the power to correct or modify final orders if the motion is made within the same term of Court. However, in each of the cases so relied on by the Government, *there was a valid indictment pending and which had not been dismissed.* The order subsequently amended or corrected related to the judgment.

VI. THE COURT OF APPEALS ERRED IN DENYING LEAVE TO FILE THE PETITION.

Although we have argued above that the writ should have issued as a matter of right on the facts set forth in the petition therefor, leave to file the petition should have been granted for another reason.

Assuming, merely for purposes of argument, that it was within the discretion of the Court of Appeals to allow the petition to be filed, the action of the Court constituted an abuse of such discretion.

The dismissal of the indictment divested the District Court of all jurisdiction and left the matter as if no indictment had ever been filed. The action of

the District Court in setting aside its order dismissing the indictment, insisting on defendants entering pleas to the indictment and proceeding with the trial of the case, would involve great trouble, time and expense to both the Government and the defendants. This should not be allowed to occur. The District Court having no jurisdiction to proceed in the matter, its action should be summarily stopped by a writ of prohibition.

VII. IMPORTANCE OF THE QUESTION INVOLVED AND CONCLUSION.

The questions presented herein are of grave importance. They deal with the power of trial Courts to divest themselves of jurisdiction and then to re-establish such jurisdiction when there is no cause or matter pending before such Court. The questions also deal with the right of citizens to seek the aid of a Court of Appeals when the lower Court is threatening to place them on trial for a serious offense when there is no accusatory pleading before such Court. These matters merit a clear enunciation of principle by the Supreme Court of the United States.

Dated, San Francisco, California,
November 24, 1952.

Respectfully submitted,
LEO R. FRIEDMAN,
JAMES E. BURNS,
Attorneys for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 466

JOHN A. MALONE AND ELEANOR F. DANA,
Petitioners

v.

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA AND THE HONORABLE GEORGE B. HARRIS, AS JUDGE THEREOF

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

There was no opinion below.

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1952 (R. 14). The petition

for a writ of certiorari was filed on November 26, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in denying petitioners' motion for leave to file a writ of prohibition to restrain further proceedings against them under an indictment on the ground that the trial court had lost jurisdiction by granting a pretrial motion to dismiss the indictment and was thereafter without power to enter, within the same term, an order vacating the dismissal.

STATEMENT

On October 28, 1952, petitioners filed a motion in the Court of Appeals for the Ninth Circuit for leave to file a petition for a writ of prohibition (R. 1).

According to the petition (R. 7-13), on February 13, 1952, petitioners and an alleged corporation were indicted in the Northern District of California on a charge of conspiracy to defraud and commit offenses against the United States in violation of 18 U.S.C. 371 (R. 7, par. III). Petitioners filed a motion to dismiss the indictment, and a motion to quash the service with respect to the alleged corporate defendant (R. 8, par. V). On April 17, 1952, Judge Louis E. Goodman dismissed the indictment (R. 8, par. VI).

The following day, the Government filed a motion for rehearing, praying that the dismissal order be vacated. Petitioners appeared specially and objected to any further proceedings in the case on the ground that the court had been divested of jurisdiction by the dismissal order. (R. 9, par. VII.) On May 16, 1952, which was within the same term of court in which the dismissal order was entered,[1] Judge Goodman vacated the dismissal order, denied petitioners' motion for dismissal, and granted the motion to quash as to the corporation. In the vacating order, Judge Goodman stated, *inter alia,* that the indictment adequately charged a conspiracy and that he was "now satisfied that the previous order [was] erroneous and that the court [had] power to correct it," citing *Ex parte Altman*, 34 F. Supp. 106 (S.D. Calif.). (R. 9-10, par. VIII.)

On October 14, 1952, pursuant to a notice to appear for the taking of pleas (R. 10, par. IX), petitioners again appeared specially and objected to any further proceedings in the case on the ground that the court had lost jurisdiction by the dismissal order. Respondent Harris, as judge of the master calendar, overruled the objection and continued the case until October 30, 1952, for the

[1] The Rules of the United States District Court for the Northern District of California provide that "Terms of this Court shall be held at San Francisco commencing on the first Monday in March, the second Monday in July and the first Monday in November of each year."

entry of pleas. In this connection, Judge Harris stated that the case would proceed to trial unless please of guilty were entered. (R. 11, par. X.)

The proposed petition for a writ of prohibition also stated that, since no appeal lay from the order vacating the dismissal order, petitioners were without an adequate remedy at law and would be subjected to the expense and vicissitudes of a trial in violation of their constitutional rights, unless respondents were restrained by the Court of Appeals (R. 12-13, par. XII). The petition concluded with a prayer for an "alternative Writ of Prohibition" restraining respondents from taking additional steps incident to the case until further notice from the Court of Appeals and for an order to respondents to show cause why they should not be absolutely barred from further proceedings under the indictment (R. 13).

The Court of Appeals denied the motion for leave to file the petition (R. 14).

ARGUMENT

1. There is no merit in petitioners' contention that the District Court was without power to vacate its order dismissing the indictment and to reinstate the cause for trial. It was well established at common law that during the same term all judgments or orders were "deemed to be 'in the breast of the court' making them, and subject to be amended, modified, or vacated by that court." *United States* v. *Benz*, 282 U.S. 304, 306-307. This

power was not during term time limited to correction of clerical errors; the question whether a mere clerical error was involved became significant only if a change was sought after the term had expired. *United States* v. *Mayer*, 235 U.S. 55, 67.

Nothing in the Rules of Criminal Procedure indicates an intention to deprive District Courts of this long recognized power to reconsider a judgment or order. Rule 57(b) provides that where, as here, "no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or any applicable statute." The abolition by Rule 45(c)[2] of the term as a measure of the time for taking action certainly does not have the effect of depriving the courts of their established power to reconsider a decision. Where, as here, the rules of the District Court do not provide a fixed period for petitions for rehearing, it may be either that the old term rule still applies, or that the motion must be brought within a time reasonable under all the circumstances. There is no necessity in this case to consider the possible time limitations. The motion for rehearing here involved was filed the day after the order of dis-

[2] "The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act in a criminal proceeding."

missal was entered, and within the same term of court. The application was, therefore, clearly timely.

2. In any event, the denial of the motion for leave to file the petition for a writ of prohibition was obviously proper. Even where jurisdictional objections are raised, the granting of the common law writs of certiorari, mandamus, and prohibition is always discretionary, never mandatory. *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 25; *U. S. Alkali Assn.* v. *United States*, 325 U.S. 196. "As extraordinary remedies, they are reserved for really extraordinary causes" (*Ex parte Fahey*, 332 U.S. 258, 260); they are never to be utilized as a substitute for an appeal or a writ of error (*I.C.C.* v. *United States*, 289 U.S. 385, 394). Notwithstanding the existence of jurisdictional questions, "Where the appeal statutes establish the conditions of appellate review [such as 28 U.S.C. 1291, prohibiting appeals except from final orders], an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases." *Roche* v. *Evaporated Milk Assn.*, *supra*, at p. 30; see also, *Whitney* v. *Dick*, 202 U.S. 132, 140; cf. *United States* v. *Rice*, 327 U.S. 742. The inconvenience of a trial, even though it is anticipated that it will be long and

costly, will not justify the writ. *Ro*
rated Milk Assn., supra, pp. 30, 31;
v. *United States, supra,* pp. 202-203. *oche* v. *Evapo-*
here presented is not "extraordina; *U. S. Alkali*
volves merely the propriety of a . The question
ruling in a type of case where the co ary", but in-
has jurisdiction. The order vaca trial court's
missal order would be reviewable on urt ordinarily
a final judgment, if one should be obt ating the dis-
petitioners. Since the only reason f n appeal from
the issuance of a writ is to avoid th tained against
expense of a trial, the Court of Appe they urge for
have been justified in granting the ne trouble and
eals would not
motion.

CONCLUSION

For the foregoing reasons, it is s respectfully
submitted that the petition for a writ t of certiorari
should be denied.

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1953—236843/P.O.933